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Hon. Robert Young
Chief Justice
Michigan Supreme Court
3034 W Grand Blvd Ste 8-500
Detroit, MI 48202

Re: Administrative File 2008-28

Dear Chief Justice Young, and justices of the Court:

The court has proposed changes to MCR 6.005(H), the staff comment noting the proposed amendment "would revise MCR 6.005(H) to clarify that appointed defense counsel in a criminal proceeding either must file a substantive response to a prosecutor's application for interlocutory appeal or notify the Court of Appeals that the lawyer intends not to submit a pleading." Though I have heard some rumblings of unhappiness with the proposed amendments to subparagraph (4), the amendment there is completely stylistic, and imposes no additional duties on counsel. I will direct my comments to subparagraph (3), then, and also suggest some additional changes that I believe would be beneficial.

The amendment to (3) does precisely what the staff comment says—it makes clear that if the prosecution files an interlocutory appeal, [appointed] defense counsel must either respond to the merits, or let the Court of Appeals know that he or she has chosen not to respond (rather than is ignoring the prosecution's filing). This is a matter of effective assistance of counsel, and undoubtedly is designed to respond to *People v. Murphy* 2006 WL 2924751 (Mich.App.,2006), where the Court of Appeals found that defense counsel's failure to respond in *any* fashion to a prosecution interlocutory appeal was ineffective assistance without regard to whether the decision reached by the Court of Appeals in that interlocutory appeal was correct or not. The Supreme Court *reversed* that decision, holding instead that on the appeal from the conviction the law of the case doctrine would not bar appellate defense counsel from relitigating the issue that had been decided adversely to the defendant

in the interlocutory appeal. This rule change is designed to avoid this outcome in the future—counsel cannot ignore an interlocutory appeal by the prosecution, but still may make the strategic decision not to respond, so long as the court is notified and therefore knows that counsel is not simply ignoring the prosecution's filing. This amendment should be adopted.

But I submit that the change does not go far enough. The matter is one of effective assistance of counsel, and the standards do not change where counsel is retained. Yet MCR 6.005(H) refers only to the responsibilities of appointed counsel (though it is titled "Scope of Trial Lawyer's Responsibilities"). My first suggestion, then, is to make clear that the provisions of the rule apply to retained counsel as well. The language I suggest to accomplish this purpose will appear below.

Secondly, this is an opportunity to solve a vexing problem for appellate defense counsel (and prosecutors). On occasion at trial a sound or video recording is played; these may be telephone calls, surveillance tapes, or recordings of the questioning of the defendant. Court reporters generally simply indicate in the transcript "tape played" or some such notation, but do not transcribe the tape into the transcript (and video-recordings cannot be memorialized as to the video content by the reporter in any event). And even photographs and documents are not contained in the transcript. When the appellate defense counsel, then, gets to this portion of the transcript, he or she is stymied unless and until he or she gets a copy of the document, picture, audio, or video recording. Ordinarily, copies of the original have been provided by way of discovery to trial defense counsel, and thus in preparation of the appeal it should be an easy matter for appellate defense counsel to retrieve all discovery from trial defense counsel in order to prepare the appeal, rather than for the prosecutor to in effect provide discovery twice.

But this is not often the case. Appellate defense counsel generally diligently attempt to retrieve this information from trial counsel, but often either receive no response from trial defense counsel to their requests, or are notified by trial counsel that he or she has destroyed the file. I believe this difficulty can be resolved by amendment of MCR 6.005(H), in the manner which appears below. The rule as I reproduce it below includes the court's proposed change with the court's underlining to indicate additions and strikeovers for deletions, and my proposed additional changes in italics, and my deletions also stricken out.

6.005(H)
(H) Scope of Trial Lawyer's Responsibilities. The responsibilities of the trial lawyer ~~appointed to represent~~ *representing* the defendant include
(1) representing the defendant in all trial court proceedings through initial sentencing,
(2) filing of interlocutory appeals the lawyer deems appropriate,
(3) responding to any preconviction appeals by the prosecutor,. <u>The</u>

defendant's lawyer must either:
(i) file a substantive brief in response to a prosecutor's interlocutory application for leave to appeal, or
(ii) notify the Court of Appeals that the lawyer will not be filing a brief in response to the application. ~~and~~

(4) Unless~~unless~~ an appellate lawyer has been appointed *or retained, or retained trial counsel withdraws*, the trial lawyer ~~appointed to represent~~ *representing* the defendant is responsible for filing of postconviction motions the lawyer deems appropriate, including motions for new trial, for a directed verdict of acquittal, to withdraw plea, or for resentencing.

(5) When an appellate lawyer has been appointed or retained, the trial lawyer who represented the defendant shall promptly make the defendant's file, including all discovery material obtained, available for copying upon request of that lawyer.

Thank you for your consideration of my comments.

Very truly yours,

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